**RHB BANK BHD**

**v.**

**ISA ABU BAKAR & ANOR**

HIGH COURT MALAYA, MUAR
UMI KALTHUM ABD MAJID J
[CIVIL SUIT NO: 22-53-2002]
12 OCTOBER 2011

***CONTRACT:*** *Employment contract - Duties of employee - Duty of care in discharging duties - Whether monies misappropriated - Whether breach of duty of fidelity and good faith - Whether breach of fiduciary duty*

***TORT:*** *Conspiracy - Conspiracy to defraud - Misappropriation of monies - Whether conspiracy proven*

***TORT:*** *Negligence - Duty of care - Duty owed by employees - Duty of fidelity and good faith - Whether monies misappropriated - Whether bank manager liable in allowing cashier to wrongfully remove physical cash - Whether breach of fiduciary duty*

The first defendant was the cashier and the second defendant was the branch manager of the plaintiff bank's Yong Peng branch ('the branch') at the material time. The plaintiff's action against the first defendant was for misappropriation of cash from the branch. The plaintiff's action against the second defendant was for assisting and/or allowing the first defendant to misappropriate cash from the branch. Alternatively, the plaintiff sued the second defendant for negligence. The misappropriation of the plaintiff's monies became known to the plaintiff accidentally after the second defendant was suspended as branch manager. An acting branch manager who was sent to the branch had discovered the misappropriations. During the investigations carried out by the plaintiff, the first defendant confessed in writing that he had misappropriated cash from the branch. It was found that the first defendant had manipulated the plaintiff's accounting system through the process relating to cash movement within the branch. The plaintiff therefore claimed against the defendants, *inter alia*, that the defendants repay the sum of RM8,250,000 ('RM8.25 million'). The first defendant denied all allegations of misappropriation. The second defendant

pleaded that he had no knowledge of the misappropriation. The issues that arose against the first defendant were: (i) whether the first defendant owed a duty of fidelity and good faith to the plaintiff; (ii) whether the first defendant owed a fiduciary duty to the plaintiff; (iii) whether the first defendant breached the said legal duties; (iv) whether the first defendant committed fraud; and (v) what were the losses suffered by the plaintiff as a result of the first defendant's wrongful conduct. On the other hand, the issues which arose against the second defendant were: (i) what were the legal duties owed by the second defendant to the plaintiff; (ii) whether the second defendant was negligent in allowing the first defendant to wrongfully remove physical cash from the branch; and (iii) whether the second defendant conspired with the first defendant to wrongfully remove monies from the branch.

**Held (allowing plaintiff's claim with costs):**

**(1)** It is an implied term of a contract of employment that an employee owes a duty to serve his employer with fidelity and in good faith. The first defendant was the employee of the plaintiff at the material time and he was therefore under the legal obligation to discharge his duty of fidelity to the plaintiff when discharging his duties as cashier at the branch. (para 23)

**(2)** The first defendant owed a fiduciary duty to the plaintiff when discharging his duties as a cashier. Based on the "guidelines" alluded in *Frame v. Smith*, the first defendant was placed in the fiduciary position *vis* the plaintiff *vis* the scope of his duties and discretion exercised as the cashier at the branch *(Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals;* refd). (paras 24 & 25)

**(3)** The first defendant had intentionally and fraudulently manipulated the ATM settlements in order to remove physical cash from the branch. The first defendant's intention to fraudulently manipulate the ATM settlements was moreover supported by his own confession. The first defendant's confession was voluntarily given by him. (para 36)

**(4)** The first defendant had breached his duty of fidelity and good faith to the plaintiff as well as the fiduciary duty to the plaintiff. (para 49)

**(5)** The plaintiff had successfully proved beyond reasonable doubt that the first defendant had defrauded the plaintiff when he had wrongfully siphoned off monies out of the branch to the amount of RM8.25 million *(Ang Hiok Seng v. Yim Yut Kiu;* refd). (para 52)

**(6)** An employee owes a duty of care when discharging his duties to his employer. This duty is implied under the contract of employment and under common law. The second defendant as the Branch Manager and an employee of the plaintiff owed a duty to act with fidelity and in good faith to the plaintiff. The second defendant also owed a fiduciary duty to the plaintiff. (para 54)

**(7)** The second defendant had breached his duty of care to the plaintiff. The breach of his duty of care to the plaintiff had caused the plaintiff to suffer losses in the form of cash which were wrongfully removed from the branch by the first defendant. (para 60)

**(8)** In order to prove the tort of conspiracy, the plaintiff needed to prove: (a) an agreement between two or more persons; (b) for the purpose of injuring the plaintiff; and (c) acts done in the execution of that agreement resulted in damage to the plaintiff. The plaintiff had successfully proved beyond reasonable doubt that the defendants had conspired to wrongfully remove monies from the branch. As a result of the defendant's conspiracy, it had caused the plaintiff to suffer losses arising from the misappropriated monies. (paras 61-63)

**Case(s) referred to:**

*Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC* ***(refd)***

*Frame v. Smith [1987] 42 DLR (4th) 81* ***(refd)***

*Loi Hieng Chiong v. Kon Tek Shin [1983] 2 CLJ 70; [1983] CLJ (Rep) 240 FC* ***(refd)***

*Malayan Banking Bhd v. Basarudin Ahmad Khan [2007] 1 CLJ 309 FC* ***(refd)***

*Robb v. Green [1895] 2 QB 315 CA* ***(refd)***
*SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA* ***(refd)***
*Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA* ***(refd)***
*Wessex Dairies Ltd v. Smith [1935] 2 KB80 CA* ***(refd)***
*Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC* ***(refd)***

*For the plaintiff - Andrew Chiew Ean Vooi (Ivan Ong Chee Kong with him); M/s Lee Hishammuddin Allen & Gledhill*
*For the 1st defendant - Zul Helmi Wakiman; M/s Sahrihan & Hamdan*
*For the 2nd defendant - Jayakumar; M/s Roy & Assocs*

*Reported by Amutha Suppayah*

## JUDGMENT

**Umi Kalthum Abd Majid J:**

**The Claim**

**[1]** The plaintiff's claim against the defendants is for an order:

(i) for the defendants, whether jointly or solely, to pay to the plaintiff the sum of RM8,250,000 ("RM8.25 million") together with interests;

(ii) for the defendants and/or the family members of the defendants and/or the defendants' agents or nominees to give full disclosure in the form of affidavit evidence as to how the RM8.25 million was used and/or expended to enable the plaintiff to recover the RM8.25 million;

(iii) that the defendants pay damages to the plaintiff;

(iv) the damages to be assessed before the Senior Assistant Registrar;

(v) interests and costs.

**[2]** The plaintiff's action against the first defendant is for misappropriation of cash from the Yong Peng branch wherein the cause of action pleaded is for:

(i) breach of his implied contractual duty of fidelity and honesty;

(ii) breach of fiduciary duty;

(iii) fraud;

(iv) conspiracy to defraud.

**[3]** The plaintiff's action against the second defendant is for assisting and/or allowing the first defendant to misappropriate cash from the Yong Peng branch. In the alternative, the plaintiff sued the second defendant for negligence wherein the cause of action pleaded is for:

(i) breach of duty of care;

(ii) breach of the second defendant's implied contractual duty of fidelity and honesty;

(iii) breach of fiduciary duty;

(iv) conspiracy to defraud.

**Facts**

**[4]** The plaintiff is a financial institution which conducted its business through one of its branches at Yong Peng, Johor ("Yong Peng branch").

**[5]** The first and second defendants were former employees of the plaintiff at the Yong Peng branch. The first defendant was the cashier and the second defendant was the branch manager of the Yong Peng branch at the material time.

**[6]** The misappropriation of the plaintiff's monies became known to the plaintiff accidentally after the second defendant was suspended as branch manager on 6 March 2002 for wrongfully abusing his discretionary powers in granting temporary overdrafts ("TOD") in excess of his discretionary limit to various customers. Due to the second defendant's suspension, SP1 was sent to relieve the second defendant at the Yong Peng branch and she arrived on 7 March 2002 at the branch as the acting branch manager.

**[7]** When SP1 arrived at the Yong Peng branch on the morning of 7 March 2002 she carried out an immediate check of the physical cash at the branch. After a cash count assisted by SP6 and SP7 in the presence of the first defendant, SP1 discovered that there was RM2 million physical cash missing at the Yong

A Peng branch. The shortage in the physical cash was discovered when, after counting the physical cash in the cash reserve room and in the tills of the cashier and tellers including the cash in use in the first defendant's room, SP1 then compared her calculations against the amounts in the Branch Daily Cash Register and the
B BDS report as at 6 March 2002 (Q & A12, P1). The Branch Daily Cash Register is to record the daily total amount of physical cash at the Yong Peng branch. It is used to carry out a daily balance of the cash position in the Yong Peng branch after the closing of banking business ("end of day balancing"). The BDS
C report is a report generated from the plaintiff's computer system. It shows the movement and amount of physical cash at the Yong Peng branch at the end of each business day.

**[8]** SP1 had also noted numerous alternations had been made
D to the Branch Daily Cash Register. She asked the first defendant about the alterations made to the Branch Daily Cash Register and the first defendant confirmed that he had made the alterations/ amendments after the officers checked the cash (para. 8, p. 226, C) so that he could balance the figures in the Branch Daily Cash
E Register. The first defendant claimed that he could not achieve a balance due to problems with the ATM transit account known as the "GL 100023".

**[9]** Not satisfied with the first defendant's explanation, SP1
F enlisted the assistance of the internal auditors, who were at that time conducting an internal audit into the second defendant's wrongdoing at the Yong Peng branch. SP1 had also notified the area business centre in Melaka ("ABC") in regard to the matter and the Head of ABC, Mr Chang Chee Keong, came to the Yong
G Peng branch on the same day.

**[10]** A second physical cash count of the Yong Peng branch was conducted on the same day (7 March 2002) by the internal audit team comprising of SP2, SP3 and SP4 after the close of banking business. The cash count was conducted in the presence of the
H first defendant. It was noted by SP4 that the first defendant had behaved uncomfortably, his hands were shaking during the cash court and when SP4 asked the first defendant "whether he was O.K, he answered yes".

I

**[11]** The second cash count concluded at about 9pm. It was then discovered that the physical cash at the Yong Peng branch amounted to RM682,593.14. This finding was recorded and confirmed by SP1, SP2 and the first defendant in the Branch Daily Cash Register on p. 205, E. The BDS report as at 7 March 2002, however, showed the physical cash in the branch to be RM6,932,539.14 - see p. 229, C.

**[12]** After comparing the physical cash in the Branch Daily Cash Register (p. 205, E) to that in the BDS report as at 7 March 2002, SP2 found that the physical cash missing was RM6.25 million (Q & A 13, P2).

**[13]** As the cash shortage at the branch was confirmed, the first defendant was then interviewed by Mr. Chang, SP2, SP3 and SP4 on the missing cash. The first interview ended about 11pm and the first defendant was asked to come again the next day (8 March 2002) to continue with his explanation.

**[14]** On 8 March 2002, SP1 together with SP2, SP3 and SP4 continued to interview the first defendant on the missing cash ("the second interview"). It was during this second interview that the first defendant had confessed to them that he had misappropriated cash from the Yong Peng branch. His confession was reduced to writing on the same day (pp. 231-235, C).

**[15]** Apart from this confession, the first defendant had answered questions posed by SP3 and SP4 by stating that he sometimes took physical cash out from the branch about RM10,000 or RM20,000 in RM100 denominations inside his pockets, most of the cash was transferred to various accounts, he had tricked the auditors by using the in-use cash to contra with the reserve cash and that he had misappropriated the bank's cash since 2000 (Q & A 22, P3).

**[16]** Following the first defendant's confession, SP1 lodged a police report (p. 236, C) and put up detailed report on the events which transpired on 7 and 8 March 2002 (pp. 225-227, C). The plaintiff then instructed a detailed audit investigation be carried out on the missing physical cash at the Yong Peng branch. SP9 was the officer from the internal audit department who carried out the investigation.

**[17]** After investigating the files, records, accounts and documents found at the Yong Peng branch, and interviewing several officers involved in the operations of the branch, SP9 found that the first defendant had manipulated the plaintiff's accounting system through the process relating to cash movement within the branch namely:

(i) when cash was loaded into and unloaded from the ATM during an ATM settlement;

(ii) transactions called "buy cashier's cash" and "sell cashier's cash" under the BDS report.

**[18]** Based on his investigation, SP9 found that by this manipulation, the first defendant had caused the plaintiff to suffer losses amounting to RM8.25 million in missing cash at the Yong Peng branch (Q & A 22, P10).

*The First Defendant's Case*

**[19]** The first defendant denies all allegations of misappropriation of the plaintiff's money and manipulation of its system. He instead claims that there was a RM2 million discrepancy which was due to the GL100023 account problem which led the plaintiff's ATM centre to instruct the branch to transfer the outstanding RM2 million balance in the ATM transit account into the cash-in-hand-account.

**[20]** The first defendant also maintains that his confession was obtained wrongfully by the plaintiff's internal auditors.

*The Second Defendant's Case*

**[21]** In his defence, the second defendant pleaded he had no knowledge of the inspection, evidence of misappropriation, alleged confession of the first defendant, alleged breaches of fiduciary duties, breaches of contractual/common law or tortious duties and alleged acts of fraud held out by the plaintiff against the first defendant. That he had at all times acted in good faith to the plaintiff and had carried out his functions and tasks to the best of his abilities given the nature of the same and in the circumstances as they occurred. He denied ever receiving RM31,000 credited to him by the first defendant from misappropriated money of RM4 million. In short, the second defendant's defence is denial of all allegations against him by the plaintiff, including that of conspiracy, and confessing to the commission of fraud and misappropriation of the plaintiff's cash in the sum of RM1,095,084.32.

**Issues Raised Against The First Defendant**

**[22]** The issues are:

(i) whether the first defendant owed a duty of fidelity and good faith to the plaintiff;

(ii) whether the first defendant owed a fiduciary duty to the plaintiff;

(iii) whether the first defendant breached the said legal duties;

(iv) whether the first defendant committed fraud; and

(v) what are the losses suffered by the plaintiff as a result of the first defendant's wrongful conduct;

**Whether The First Defendant Owed A Duty Of Fidelity And Fiduciary Duty To The Plaintiff?**

**[23]** The answer to this issue is yes. It is trite law that it is an implied term of a contract of employment that an employee owes a duty to serve his employer with fidelity and in good faith as was enunciated in case of *Robb v. Green* [1895] 2 QB 315, CA and *Wessex Dairies Ltd v. Smith* [1935] 2 KB 80, CA. It is not disputed that the first defendant was the employee of the plaintiff at the material time. He was therefore under the legal obligation to discharge his duty of fidelity to the plaintiff when discharging his duties as cashier at the Yong Peng branch.

*Fiduciary Duty*

**[24]** As for fiduciary duty, I agree with the submission of the plaintiff's learned counsel that the first defendant owed a fiduciary duty to the plaintiff when discharging his duties as a cashier based on the facts that:

(i) the first defendant was the only officer who held the position of cashier;

(ii) he was responsible for the custody and safe keeping of the physical cash at the Yong Peng branch;

(iii) he was responsible for ensuring the correctness of all records relating to the cash position at the branch, such as the Branch Daily Cash Register, the BDS reports;

A (iv) he was involved in the movement of physical cash within the branch, especially in the context of ATM settlements and "buy cashier's cash" and "sell cashier's cash" transactions;

(v) he had direct access to the physical cash at all times, where
B other officers could not utilise the cash within the first defendant's custody without his permission;

(vi) he had the authority to validate transactions that affected the correctness of information at the Yong Peng branch's BDS system.
C

**[25]** In the Court of Appeal case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607, Gopal Sri Ram JCA (as he then was), in delivering the court's judgment, had approved and adopted the
D decision of Wilson J in the case of *Frame v. Smith* [1987] 42 DLR (4th) 81, wherein the latter had identified, by way of guidelines only, some of the primary characteristics of a fiduciary relationship and had quoted Her Ladyship as follows at pp. 641-642:

E Yet there are common feature discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

F Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

G (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
H

…

With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty
I necessary. Indeed fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or 'practical' interests …

Based on the "guidelines" alluded to in the above case, I find that the first defendant was placed in the fiduciary position vis the plaintiff vis the scope of his duties and discretion exercised as the cashier at the Yong Peng branch.

**Whether The First Defendant Breached His Legal Duties?**

**[26]** It is the plaintiff's case that the first defendant was responsible for the missing cash when he had wrongfully removed the physical cash by manipulating the procedures involving ATM settlements, where he was primarily responsible for the whole process of loading and unloading cash from the ATM (Q & A65, P6), and the "buy cashier's cash" and "sell cashier's cash" transactions.

**[27]** Detailed evidence was led to first of all give an understanding of what an ATM Settlement refers to and how it is carried out. An ATM Settlement is carried out when the ATM is either running short or has run out of cash. The loading and unloading process (of cash into/from the ATM cassettes) is carried out simultaneously during an ATM settlement (Q & A 30, P10).

**[28]** As SP9 had detected 19 transactions where the amounts validated during the loading and unloading processes were different, suffice for me to refer to an example of each process. To this end I accept the evidence given by the plaintiff's witnesses, SP9 in particular, as being truthful and objective based on contemporaneous documentary evidence.

**[29]** An example of the loading process can be seen from the ATM settlement on 28 April 2001, pp. 3-5 of bundle C where:

(i) based on the ATM settlement worksheet, physical cash amounting to RM184,000 was withdrawn from the cashier's cash holding.

The cash comprised of 3300 pieces of RM50 notes and 1900 pieces of RM10 notes. The physical cash was then loaded into cassettes for the purpose of loading into the machine;

(ii) the loading process was carried out by the first defendant, as the cashier, with the ATM officer (who was SP5). This procedure of loading was supposed to be documented and signed by both officers in the ATM settlement worksheet and the cash movement voucher;

(iii) when the physical cash had been loaded into the ATM machine, the first defendant was required to validate the transaction into the BDS system. The validation process involved the keying-in of the amount loaded into the ATM machine and the amount would be printed onto the cash movement voucher;

(iv) when the validation had been carried out, the first defendant was required to hand over a duplicate of the validated cash movement voucher to the ATM officer for her records.

**[30]** Similarly, an example of the unloading process was carried out can be seen from the ATM settlement on 4 May 2001, pp. 14-16 of bundle C where:

(i) based on the ATM settlement worksheet, physical cash amounting to RM215,520 was removed from the ATM machine (p. 16, C). The cash comprised of 4231 piece of RM50 notes and 397 pieces of RM10 notes. The physical cash from the cassettes removed from the ATM machine was required to be brought back to the cashier's room;

(ii) the unloading process was carried out by the first defendant, as the cashier, with the ATM officer (who was SP5). This procedure of unloading was supposed to be documented and signed by both officers in the ATM settlement worksheet and the cash movement voucher;

(iii) when the physical cash had been unloaded from the ATM machine, the first defendant was required to validate the transaction into the BDS system. The validation process involved the keying-in of the amount unloaded from the ATM machine and the amount would be printed onto the cash movement voucher;

(iv) after the validation had been carried out, the first defendant was required to hand a duplicate of the validated cash movement voucher to the ATM officer for her records.

**[31]** In regard to the loading and unloading process, the first defendant was required to:

(i) verify the ATM settlement worksheet which was prepared by the ATM officer;

(ii) prepare the cash movement voucher to record the nature of transaction and amount transacted. The cash movement Voucher was supposed to be confirmed by the ATM officer before the first defendant validated the amount into the BDS system;

(iii) validate the transaction by keying-in the amount loaded and/or unloaded from the ATM machine into the BDS System at the branch; and

(iv) deliver a duplicate of the cash movement voucher immediately or on the same day after it had been validated to the ATM officer.

**[32]** As it turned out, evidence was led to show that the first defendant had validated amounts which were different from the amounts stated in the cash movement vouchers or ATM settlement worksheets. There were 19 such transactions in all (see Q & A 32-53, P9).

**[33]** In many instances the handwritten amount in the cash movement voucher had been signed and confirmed by the ATM officer involved in the ATM settlement before the first defendant carried out validations into the BDS system. I am in no doubt that the first defendant was the person who had validated the different amounts into the BDS system in respect of the 19 ATM settlements in question. This is because the cash movement vouchers and the TS GL online reports for the 19 ATM settlements showed the first defendant's BDS ID number. This proved that the first defendant had carried out the validation. The first defendant did not dispute this fact when it was put to him during cross-examination (pp. 114, 115, 116, 117 notes of evidence).

**[34]** Further, there was evidence of the first defendant validating amounts into the BDS system based on the ATM settlement worksheets and cash movement vouchers which were not signed by the ATM officers, even though this was a procedural requirement. For examples, see pp. 8, 80, 116, 117, 130, 143, 155, 168, 179, 192, 204 and 215 of bundle C in regard to cash movement vouchers, and pp. 140, 165, 189 and 201 of bundle C in regard to ATM Settlement Worksheets.

**[35]** Evidence also showed that the first defendant had taken steps to conceal his wrongdoings. Where he was required to forward a duplicate copy of the validated cash movement vouchers to the ATM officer for verification immediately after or on the same day of the ATM settlement was conducted, the first defendant had most of the time provided the ATM officer with the duplicate validated cash movement vouchers in batches over a period of time and sometimes only after having been requested for it (Q & A 33, P8). Due to this delay by the first defendant, SP8 testified that he did not check the contents of the cash movement vouchers when they were finally given to him (p. 67, note of evidence). SP5 in fact stated that the first defendant never gave her the duplicate of the cash movement vouchers even though she had requested for it many times (Q & A 30, P5) in respect of the times she replaced the regular ATM officer. The first defendant instead gave her reasons for not giving her the duplicates (Q & A 31, P5). As I have stated before, I accept the testimony of SP5 and SP8 as being truthful. With the same token I am unable to accept the testimony of the first defendant that he gave the duplicate cash movement vouchers to the ATM officer on the same day when the ATM Settlement was conducted as being truthful. I agree with the submission of learned counsel for the plaintiff that if the validated duplicate of the cash movement vouchers had been handed to the ATM officer on time, the irregularities on the cash movement vouchers would have been glaringly obvious and the ATM officer would have immediately spotted them.

**[36]** In view of the above evidence, I find that the first defendant had intentionally and fraudulently manipulated the ATM settlements in order to remove physical cash from the Yong Peng branch.

*Daily Cash Register*

**[37]** The duplicity of the first defendant can further be seen in his actions in regard to the entries he had caused to be entered in to the daily cash register of the branch.

**[38]** The erroneous/questionable amounts validated into the BDS system would be reflected in a daily BDS report. The BDS report would show the physical cash position at the Yong Peng branch at the close of the banking business each day.

**[39]** The BDS report would be used for the purpose of carrying the end of day cash balancing wherein the physical cash at the branch at the close of banking business each day was counted. According to SP9, the end of day cash balancing should be carried out by the cashier/first defendant and another officer of the branch, that is, the second defendant or the assistant branch manager.

**[40]** The persons involved in the counting of the cash would rely on the Branch Daily Cash Register and the BDS report. The Branch Daily Cash Register was used to record the total daily cash position of the branch and the first defendant was responsible for entering the figures into the register after the cash was balanced at the end of the business day. The amount under "to-day's balance" in the register ought to be the same as the amount stated in the BDS report.

**[41]** The original Branch Daily Cash Register was produced in court and I had observed that there were many alterations and amendments made to the register. Procedurally all amendments to the register must be approved by the person who counted the cash during the end of day balancing exercise was carried out. Instead, the register showed that:

(i) numerous alterations and amendments were made in the register which were not initialled by the officer who counted the cash. Some alterations were only initialled by the first defendant when it should have been initialled by the officer who counted the cash (see pp. 66-67, 83-84, 86-89, 94-95 and 106-109, E);

(ii) upon close physical examination of the register one could see that the figures in the register were amended to reflect a higher or smaller number. The alterations were made to match the total amount of cash counted at the branch on a particular day (see pp. 89, 146, 153, 154, 155, 204, E);

(iii) there were occasions where there were omissions to state the total amount. During the trial, when the amounts were totalled, it was found that there were discrepancies between the amounts stated under "to-day's balance" and the "total (in use + reserve)". The calculations were reduced to writing for convenience and they were verified and confirmed by the first defendant and marked as exh. P12. The calculations on these entries were signed by the first defendant (see pp. 190 - 199, 202, E).

**[42]** The first defendant explained that he had to make the said alterations so that they would match the amounts stated in the BDS report. He claimed that the figures stated in the daily BDS reports were inaccurate because of problems with the ATM transit account where he claimed ever since the implementation of the ATM transit account for the purpose of ATM settlements in April 2001, there was an imbalance in the ATM transit account. This had in turn resulted in the figures generated in the BDS report to show a total amount of physical cash that was different from the actual physical cash which was recorded in the Branch Daily Cash Register. The first defendant referred this problem as the GL100023 account problem.

**[43]** I find the first defendant's explanation as to why he needed to make the alterations as being a lame one, to say the least. In fact I find it to be improbable and unbelievable. His explanation ran counter to clear evidence of him validating erroneous/questionable amounts into the BDS system. According to SP9, the validation of such erroneous amounts into the BDS system had resulted in an imbalance to the ATM transit account and hence, the figures generated in the BDS report.

**[44]** Further, there was no evidence adduced which showed the first defendant was instructed to make the amendments so that the figures in the Branch Daily Cash Register would match the amount in the BDS report. SP1 had testified to the fact that the plaintiff had never maintained such a practice. In her testimony during examination-in-chief, SP1 had asked the first defendant as to why there were so many alterations to the Branch Daily Cash Register, and upon the first defendant giving her the similar explanation, SP1 had replied that this was not necessary. That she had faced similar problems at her branch at Batu Pahat and had managed to resolve it without any need to carry out a false balancing (Q & A 34, 37, P1).

**[45]** The ATM transit account was introduced since April 2001 and the first defendant alleged that the problem arose since then. And yet the first defendant did not take any steps to alert anybody from the ABC nor at the head office. I agree with learned plaintiff's counsel's submission that if this was a genuine problem, a reasonable person/employee in the first defendant's position would have immediately brought the matter to the attention of his superiors. This especially so since there was an

internal audit conducted at the Yong Peng branch in May 2001 and it continued until November 2001. As the cashier, the first defendant could have easily brought this problem to the attention of the auditors (see pp. 139-140, note of evidence) but he did not.

**[46]** The first defendant's intention to fraudulently manipulate the ATM settlements was moreover supported by his own confession on pp. 231 to 235, bundle C. Based on the testimonies of SP2, corroborated by that of SP1, SP3 and SP4 who were present when the confession was recorded, I find that the first defendant's confession was voluntarily given by him. This is evidenced by the fact that:

(i) he had requested for blank papers to personally write down his confession;

(ii) the confession was written in his usual handwriting;

(iii) he had even amended his confession, indicating that he had considered the contents and import of his confession and had nevertheless agreed to its contents;

(iv) in para. 2 of his confession, the plaintiff had ostensibly given particulars of bank accounts wherein he had deposited the sum of about RM4 million. The particulars given by the first defendant at first glance appear to be genuine and yet upon closer perusal one would come to realise that the account numbers written down by him stood for nothing. In fact SP9 testified that the said information given by the first defendant was insufficient for SP9 to ascertain the accounts and therefore he could not carry out his investigation (p. 93, notes of evidence). I would imagine that if the first defendant's allegation against his "interviewers" was true, in that he had been pressured and coerced into giving his confession, his interviewers would have made it certain for him to give more particulars of the bank accounts than that he had volunteered to give, to enable the plaintiff to pursue further in its investigation;

(v) the first defendant's movements were not restricted and he was given opportunities to take breaks during the course of the interview on 8 March 2002;

(vi) the second interview on 8 March 2002 was a continuation from the first interview with the auditors on 7 March 2002. During the first interview on 7 March 2002, the first defendant had alleged that the missing cash was due to the instructions from the ATM Centre. When it was put to the first defendant during cross-examination that he could have but did not produce any evidence to support his allegation during the second interview on 8 March 2002, and despite being cautioned by the court, the first defendant was not able to give a reasonable explanation (p. 153, notes of evidence);

(vii) SP3 and SP4 testified (Q & A 22, P3; Q & A 22, P4) that the first defendant had, apart from the confession, stated during the second interview that:

(a) sometimes he took physical cash out from the branch about RM10,000 or RM20,000 in RM100 denominations inside his pockets;

(b) most of the cash was transferred to various accounts;

(c) the auditors could trace the missing physical cash of RM800,000 on the day they came last year. He explained that he tricked the auditors by using the in-use case to contra with the reserve cash; and

(d) he has misappropriated the bank's cash since 2000 and able to cover for RM500,000.00

*"Buy Cashier's Cash" And "Sell Cashier's Cash" Transactions*

**[47]** The "buy cashier's cash" transaction was involved by the first defendant in the BDS system when he advanced the required cash to the teller. Consequent to a "buy cashier's cash" transaction, the first defendant must key-in the same amount under the "sell cashier's cash" transaction. There therefore must be a corresponding amount between the "buy cashier's cash" and "sell cashier's cash" transaction in the BDS report. This was to ensure that the cash position at the branch would balance. The amount transacted was then recorded and reflected in the BDS report under the relevant headings (Q & A 55, P9).

**[48]** During the trial, evidence was led to show there were 58 transactions involving fictitious "sell cashier's cash" transactions which amounts were higher than the "buy cashier's cash" transactions. A summary of these transactions and the references to the documents were adduced through the testimony of SP9,

Q & A 60 and 61, P9. All 58 transactions were carried out personally by the first defendant as seen from his BDS ID No. 990237 shown in the documents referred to. The first defendant had in fact admitted at pp. 119 and 120 of the notes of evidence that in these 58 transactions there were indeed differences in the amounts of the "buy cashier's cash" and "sell cashier's cash" even though the amounts should be the same. He had also confirmed the accuracy of the amounts and differences stated in these 58 transactions. The first defendant had also admitted that he did not report these discrepancies to the plaintiff (p. 136, notes of evidence).

**[49]** For the reasons stated above, I find that the first defendant had breached his duty of fidelity and good faith to the plaintiff as well as the fiduciary duty to the plaintiff.

**Whether The First Defendant Committed Fraud?**

*What Are The Losses Suffered By The Plaintiff As A Result Of The First Defendant's Wrongful Conduct?*

**[50]** Syed Othman FJ (as he then was) in delivering the judgment of the Federal Court in the case of *Loi Hieng Chiong v. Kon Tek Shin* [1983] 2 CLJ 70; [1983] CLJ (Rep) 240 had this to say about fraud:

> As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true ...
>
> In *Derry v. Peek* it was held that to establish fraud it is necessary to prove the absence of a honest belief in the truth of that which has been stated; in the words of Lord Herschell "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false".
>
> ... fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

**[51]** The burden of proof which the plaintiff has to discharge against the first defendant for fraud is beyond a reasonable doubt (see Federal Court cases of *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229).

**[52]** Based on the documentary evidence and testimonies of the plaintiff's witnesses as well as that of the first defendant alluded to by me earlier, I find that the plaintiff has successfully proved beyond a reasonable doubt that the first defendant had defrauded the plaintiff when he had wrongfully siphoned off monies out of the Yong Peng branch to the amount of RM8.25 million.

**Issues Raised Against The Second Defendant**

**[53]** The issues involved in the plaintiff's claim against the second defendant are:

(i) what were the legal duties owed by the second defendant to the plaintiff?

(ii) whether the second defendant was negligent in allowing the first defendant to wrongfully remove physical cash from the Yong Peng branch?

(iii) whether the second defendant conspired with the first defendant to wrongfully remove monies from the Yong Peng branch?

**What Were The Legal Duties Owed By The Second Defendant To The Plaintiff?**

**[54]** An employee owes a duty of care when discharging his duties to his employer. This duty is implied under the contract of employment and under common law (see *Malayan Banking Bhd v. Basarudin Ahmad Khan* [2007] 1 CLJ 309, FC).

**[55]** It is not disputed that the second defendant was the branch manager and an employee of the plaintiff. The second defendant therefore owed a duty to act with fidelity and in good faith to the plaintiff.

**[56]** On the same authorities cited in respect of the first defendant, I agree with the submission of the learned counsel for the plaintiff that the second defendant owed a fiduciary duty to the plaintiff in view of the facts that:

(i) the second defendant, as the branch manager, was ultimately responsible for the management and physical cash position of the Yong Peng branch (p. 183, notes of evidence) including monitoring the physical cash position of the Yong Peng branch (p. 194, notes of evidence); and

(ii) the plaintiff relied on the second defendant, as its branch manager, to manage and report to the plaintiff on any irregularities at the Yong Peng branch. All officers at the branch had to report to him (pp. 189-190, notes of evidence).

**Whether The Second Defendant Was Negligent In Allowing The First Defendant To Wrongfully Remove Physical Cash From Yong Peng Branch?**

**[57]** The second defendant's duty to the plaintiff as branch manager was:

(i) to check the actual cash position of the branch on a daily basis;

(ii) oversee the work carried out by the first defendant as the cashier and ensure his officers comply with the procedures at the branch;

(iii) check the ATM settlements, including the cash movement vouchers;

(iv) check the daily cash position at the branch, including the Branch Daily Cash Register;

(v) check the BDS reports.

**[58]** It was submitted by the plaintiff that the second defendant had breached his duty of care to the plaintiff by failing to exercise reasonable due diligence, skill and care in overseeing the first defendant's work and thereby negligently permitting the first defendant to wrongfully remove physical cash from the Yong Peng branch. This was evidenced by the following:

*ATM Settlement and Cash Movement Vouchers*

(i) while the second defendant had agreed that he needed the cash movement vouchers to check the correctness of the ATM settlements carried out for the day, yet he admitted that he was aware that the first defendant was handing over the cash movement vouchers late. The second defendant was also aware that his ATM officer, SP8, was facing the same problem. He admitted that this was a serious problem because without the cash movement vouchers, a proper verification of the BDS report could not be carried out (pp. 186, 191, notes of evidence);

(ii) when the second defendant was cross-examined as to what he did when the first defendant was giving him bunched up cash movement vouchers irregularly, the second defendant could not answer. When pressed for an answer, he at first attempted to push the responsibility on to the ATM officer, a short while later he asked for a break from giving evidence in the midst of cross-examination. Upon being cautioned by the court, he condescended to continue with his evidence. This served to show that the second defendant acknowledged that the irregular handing-over of the cash movement vouchers was fundamentally wrong;

(iii) the second defendant claimed that he had made quite a number of verbal requests for the cash movement vouchers and that the cash movement vouchers would be given to him by the first defendant in a bunched-up form 2-3 days later;

(iv) despite the recalcitrance of the first defendant, the second defendant, as branch manager, did nothing to address the so called "serious problem". Neither did the second defendant explain why he never took any action against the first defendant;

(v) at this juncture I accept the plaintiff's submission on the facts proved that the second defendant did breach his duty of care and was grossly negligent in discharging his duties. I find the second defendant to be lacking in honesty generally when answering questions posed to him. I therefore disregard his testimony on the cash movement vouchers with discrepancies which were allegedly not shown to him, and that he had raised the issue of late submission of cash movement vouchers during monthly officers' meetings (as being the action he had taken to address the "serious problem"), as being not credible and a mere convenient excuse for his negligence. I agree with the submission of the learned plaintiff's counsel that if it was true the second defendant had raised the said issue of late cash movement vouchers at the monthly officers' meetings, he could not support his assertion by failing to call any witness to support his case. Neither did he challenge the plaintiff's witnesses who were the bank officers at the branch at the material time on this aspect;

*Branch Daily Cash Register*

(vi) the second defendant had reviewed and signed on the Branch Daily Cash Register from 5 July 2001 until 26 November 2001. He however stopped signing on the register on a daily basis from 27 November 2001 onwards as can be seen on pp. 132-139, 142-145, 147-150, 152-153, 155-184, 186-193, 198-199 and 201 of bundle E;

(vii) when the second defendant was asked during cross-examination (p. 214, notes of evidence), why he did not sign on those dates, he claimed that he may not be in the office or attending courses on those dates and the next officer would take over. This testimony contradicted with his testimony during examination-in-chief, Q & A 39 and 40, D2, where he testified that he would be out of the branch for two to three hours every working day for marketing and be in Melaka to attend meetings in the ABC;

(viii) upon further cross-examination, the second defendant was still unable to give a plausible explanation as to why he did not sign on the said pages (see p. 214, notes of evidence);

(ix) with regard to the alterations in the register, the second defendant merely answered he could not remember whether he had asked the first defendant on the alterations made;

(x) evidence also showed that there were alterations made to the register which were not initialled by the person who counted the cash. Second defendant confirmed that there ought to be two initials against the amendments (p. 216, notes of evidence) and yet when he was shown an amendment made by him on p. 140, E, and he was asked why SP8 was not asked to initial the amendment, the second defendant could only answer "I can't recall" (p. 216, notes of evidence);

(xi) with regard to the daily cash balance on pp. 189-199 and 202 of bundle E, the total of the amounts under "reserve" and "in use" columns were left empty. During trial, it was established that the total of the amounts under "reserve" and "in use" columns were significantly different from the amount recorded under "today's balance" (see P12). And yet the second defendant had signed several of these daily cash balances;

A *"Buy Cashier's Cash" And "Sell Cashier's Cash" Transaction*

(xii) it was earlier submitted that there were obvious imbalances in the "buy cashier's cash" and "sell cashier's cash" transactions for the period 14 June 2000 to 2 January 2001 and 2 June
B 2000 to 26 December 2000. These transactions were conducted by the first defendant as cashier. The imbalances were reflected in the BDS reports on pp. 209-231, E and pp. 1-38, D. The second defendant confirmed that he had received the said BDS reports (p. 204, notes of evidence) and
C that he would check the BDS reports on a daily basis (p. 185, notes of evidence);

(xiii) however, despite the second defendant having reviewed and approved the BDS reports, there were discrepancies between
D "buy cashier's cash" and "sell cashier's cash" transactions as can be seen on pp. 223, 227 of bundle E (p. 204, notes of evidence).

**[59]** Based on the matters referred to in paras. 55.1 to 55.13, I find that the second defendant had breached his duty of care
E to the plaintiff.

**[60]** As a result of the breach of his duty of care to the plaintiff, I find that it had caused the plaintiff to suffer losses in the form of cash which were wrongfully removed from the Yong Peng
F branch by the first defendant.

**Whether The Second Defendant Conspired With The First Defendant To Wrongfully Remove Monies From The Branch?**

G **[61]** In order to prove the tort of conspiracy, the plaintiff needs to prove:

(i) an agreement between two or more persons;

H (ii) for the purpose of injuring the plaintiff; and

(iii) acts done in the execution of that agreement resulted in damage to the plaintiff (see *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389, CA).

I **[62]** The burden of proof in respect of this tort of conspiracy to defraud the plaintiff is beyond reasonable doubt (*SCK Group Bhd supra*).

**[63]** I find that the plaintiff has successfully proved beyond reasonable doubt that the defendants had conspired to wrongfully remove monies from the branch. I do so for the following reasons: A

(i) the defendant held key positions at the Yong Peng branch, with the first defendant, as the cashier, being the custodian of the physical cash at the branch, whilst the second defendant, as the branch manager, was ultimately responsible for the management of the branch and being in the position to ignore, if not condone, the non-observance of the plaintiff's established procedures regarding the accounting of monies at the branch; B C

(ii) the second defendant had conspired with the first defendant by taking active steps to conceal the fraud committed by the first defendant. This can be seen when the second defendant failed to take any action against the first defendant although he knew that the first defendant did not submit the cash movement vouchers on time, which delay, the second defendant admitted was a serious problem; D

(iii) the second defendant failed to question and or take action against the first defendant for the alterations and amendments made to the entries in the Branch Daily Cash Register, even though he purportedly was suspicious of it. As I have stated earlier, I question the probity of the second defendant's testimony generally. It does not stand to reason for a branch manager in the second defendant's position being entrusted with the branch's business to just standby and be an onlooker to matters which occurred right before his eyes and which were materially affecting the cash position of the plaintiff at the branch, if not for the fact that he must have been part of the conspiracy to defraud the plaintiff of its monies; E F G

(iv) similarly the second defendant's alleged failure to notice the imbalance between the "buy cashier's cash" and "sell cashier's cash" in the 50 - 60 BDS reports for the period of 14 June 2000 to 2 January 2001 and 2 June 2000 to 26 December 2000 was inexplicable other than the fact that it was intentional on his part not to notice the imbalance. This is more so in view of the second defendant's experience with the bank and it was improbable for him not to have noticed the imbalance; H I

(v) an internal audit was conducted for the period between June 2000 and May 2001. In November 2001, an internal audit report was produced. Based on the internal audit report, the auditors had discovered a shortage of RM2 million. Instead of investigating into the shortage, the second defendant claimed that this was due to the implementation of the ATM Transit Account that took place in April 2001. This was the same reason that the first defendant kept on bandying about as his explanation for the missing monies. And yet according to the testimony of SP9, when the head office had asked the branch to reverse the RM2 million in the ATM transit account to the cash-in-hand account, the head office was under the impression that it was transferring the outstanding amount from the ATM transit account back into the branch's cash-in-hand account. After his investigation, SP9 found that there never was any cash-in-hand nor in the ATM machine in the first place (p. 90, notes of evidence);

(vi) the second defendant had affirmed that he did review all records relating to the ATM transit account for April and May 2001. But when he was specifically asked if he had reviewed the ATM settlements on 28 April 2001, 4 May 2001 and 18 May 2001, he changed his answer and stated "Saya tidak melihat dokumen-dokumen ini. Tidak ada initial saya." He went on to answer the question "Are you saying that you did not do a proper review of your documents and records?" as "Tak pasti." (p. 202, notes of evidence);

(vii) when the second defendant was asked whether he had disclosed all the relevant reports to the internal auditors in June 2001, he evaded the question by stating that the internal auditors had purportedly informed that some of the reports were not given (p. 201, notes of evidence). When he was reminded that he did not answer the question, the second defendant replied "Saya tak tahu menjawab";

(viii) when the second defendant was asked to confirm whether the BDS reports for the audit period of June 2000 to May 2001 was disclosed to the internal auditors, he initially did not reply to the question and subsequently he said "I can't remember" (pp. 203-204, notes of evidence). I agree with the plaintiff's submission that the second defendant was being deliberately evasive on this issue because the BDS reports

were not disclosed to the internal auditors. If they had been disclosed, the auditors would have detected the imbalances in the buy cashier's cash and sell cashier's cash for the period 14 June 2000 to 2 January 2001 and 2 June 2000 to 26 December 2000;

(ix) when the internal auditors were reviewing the audit in November 2001, the Yong Peng branch was still facing problems with an imbalance with its ATM transit account. And yet the second defendant did not bring this problem to the attention of the internal auditors. I therefore agree with the plaintiff's submission that the second defendant's failure to bring this problem to the attention of the auditors showed that he had intentionally withheld the information in order to avoid detection;

(x) furthermore, the defendants' confessions show that there was an agreement to participate in a joint effort to defraud the plaintiff. In his confession the second defendant had admitted that he had personal financial problems. He had also made the confession in the presence of his colleagues, SP6 in particular, which subsequently led to SP6 lodging a report against him to the ABC in Melaka. The second defendant's financial difficulties set the stage for the real likelihood of him entering into an agreement with the first defendant to defraud the plaintiff. The first defendant's confession had implicated the second defendant directly when he stated that he withdrew RM31,000 to help the second defendant,

**[64]** As a result of the defendants' conspiracy, it had caused the plaintiff to suffer losses arising from the misappropriated monies to the amount of RM8.25 million.

## Conclusion

**[65]** In view of all the reasons stated above, I find that the plaintiff has successfully proved its case against the defendants and I allow the plaintiff's claim in prayers (a) to (e) with costs at RM20,000 to be paid by each defendant to the plaintiff.